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No. 80-1913

In the Supreme Court of the United States

OCTOBER TERM, 1980

MONONGAHELA POWER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, in view of an agreement between petitioner and a railroad providing an alternative method for minimizing petitioner's overall demurrage charges, the Interstate Commerce Commission abused its discretion in declining to order the refund to petitioner of particular demurrage charges that were properly assessed by the railroad under the applicable tariff.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-7) is reported at 640 F. 2d 504. The opinions of the Review Board of the Interstate Commerce Commission (Pet. App. A-8 to A-11) and of the Commission's administrative law judge (Pet. App. A-12 to A-26) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1981. The petition for a writ of certiorari was filed on May 14, 1981. The jurisdiction of this Court rests on 28 U.S.C. 2350 and 1254(1).

STATEMENT

1. Railroads assess demurrage charges against shippers with respect to cars that the shippers do not unload within a specified period of "free time." Under the tariffs applicable in this case, the charges were $10 per car for each of the first four days beyond the initial free time, $20 for each of the next two days, and $30 for each subsequent day (Pet. 13 n.8). Such demurrage charges have a double purpose: "One is to secure compensation for the use of the car and the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention." *ICC* v. *Oregon Pacific Industries, Inc.*, 420 U.S. 184, 189-190 (1975), quoting *Turner Lumber Co.* v. *Chicago, M. & St. P. Ry.*, 271 U.S. 259, 262 (1926).

The tariff of respondent Baltimore & Ohio Railroad Company (B & O) contains two alternative methods for computing demurrage charges: the straight demurrage and the average agreement methods. Under the straight demurrage method, the shipper is assessed demurrage charges at the rate set forth in the tariff on each car that is held beyond the free time for loading and unloading. Under the average agreement method, however, the shipper may offset demurrage charges (at the rate of $10 per day) on those cars that are held beyond the period of free time with "credits" earned on other cars that were released within the first 24 hours of free time (Pet. App. A-4).

Straight demurrage automatically applies unless the shipper and railroad have agreed to use the average agreement method. B & O and petitioner agreed in 1945 to use the average agreement method, and that agreement has been in effect ever since. Either party could have canceled the average agreement at any time and reverted to the straight demurrage method, but neither petitioner nor B & O elected to do so (Pet. App. A-2 to A-4).

2. B & O delivered cars containing coal to one of petitioner's generating plants during the winter of 1977-1978.[1] Petitioner had difficulty unloading the coal, however, because cold weather had frozen the coal inside the cars. The unloading difficulties prevented petitioner from returning many of the cars to B & O within the period of free time specified in the tariff. As a result, B & O assessed demurrage charges against petitioner in the amount of $970,940 (Pet. App. A-2).[2] Petitioner paid the charges and then filed a complaint with the Interstate Commerce Commission seeking a refund of the portion of the charges that could be said to be a penalty for retention of the cars, rather than compensation to B & O for use of the cars during the period of delay. Applying the principle that a shipper is entitled to a refund of penalty demurrage if the shipper's actions were not the proximate cause of the events leading to the assessment of the demurrage and the shipper exercised due diligence to avoid the demurrage, the administrative law judge ordered B & O to refund the penalty portion of the demurrage (*id.* at A-12 to A-26).

B & O appealed the ALJ's decision to a Review Board composed of three Commission employees. The Review Board reversed the ALJ's decision and dismissed the complaint, holding that the existence of the average agreement between B & O and petitioner precluded recovery of the penalty portion of the demurrage charge (Pet. App. A-8 to A-11). The Board concluded that the average agreement is in the nature of a contract between the shipper and carrier that contains specific conditions for relief from demurrage

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[1]The demurrage charges assessed against petitioner by B & O during the previous winter of 1976-1977 were involved in *Monongahela Power Co.* v. *United States*, No. 80-1268, cert. denied (Mar. 30, 1981).

[2]B & O adjusted the demurrage charges to take account of the two additional days of free time the tariff affords in cases of frozen lading (Pet. App. A-3 & n.2).

by permitting the shipper to offset charges with credits earned on other cars. Where the parties have addressed the demurrage issue in this fashion, the Board ruled, the Commission should not afford administrative relief different from that provided for in the agreement between the parties. Accordingly, the Board found that when parties have executed an average agreement, demurrage charges from frozen lading may not be found unreasonable, even if the shipper's actions were not the proximate cause of the detention and the shipper acted with due diligence to avoid the detention. The Board found further support for its conclusion in the Commission's recent policy pronouncements encouraging the establishment of rates by contract (*id.* at A-10).

The full Commission denied petitioner's request for discretionary review of the Review Board's decision, concluding that the case did not present an "issue of general transportation importance" (Pet. 5).

3. The court of appeals affirmed the Commission's decision in all respects (Pet. App. A-1 to A-7). The court found that the Commission's denial of petitioner's refund request was an appropriate exercise of the Commission's discretion to determine whether clearly applicable demurrage charges are nevertheless unreasonable in the circumstances of a particular case (*id.* at A-6). The court acknowledged the Commission's general policy of ordering a refund of the penalty portion of demurrage charges to a shipper that was operating under the straight demurrage method, where the shipper did not cause the detention and acted diligently to reduce the amount of demurrage. The court held, however, that the Commission's different treatment of petitioner was reasonable because the Commission has consistently denied demurrage refunds where an average agreement is in effect between the parties and because, in the court's view, the average agreement had afforded petitioner the opportunity

to reduce its overall demurrage charges during the 30 years the agreement was in effect (*id.* at A-7).

ARGUMENT

Petitioner argues that, as a matter of tariff interpretation, it is entitled to abatement of the penalty portion of the demurrage charges,[3] and that, in any event, the Commission's stated basis for treating it differently from shippers not operating under average agreements is not rational. These claims are insubstantial.

The court of appeals correctly rejected petitioner's argument (Pet. 11-12) that, as a matter of interpretation of B & O's tariff, it is entitled to a refund of the penalty demurrage due to frozen lading. The court below found that the applicable tariff "is altogether unambiguous in imposing the demurrage (both compensatory and penalty)" (Pet. App. A-5 to A-6). Accordingly, as the court remarked (*id.* at A-6): "The question is simply whether the charge, clearly applicable, shall nevertheless, under the ICC's discretionary power to abate applicable tariffs and other charges, be forgiven to the extent of the penalty portion of the demurrage on the grounds that, in the circumstances, it is unreasonable."

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[3]Petitioner contends (Pet. 11) that the Commission was obligated to afford it relief because the average agreement, which incorporates by reference the terms of the General Demurrage Tariff, does not by its terms prohibit relief from demurrage charges associated with frozen lading (beyond the two additional days of free time expressly provided in cases of frozen lading), in contrast to the express provision for relief from demurrage charges associated with weather interference and bunching. But the Commission does not argue that it was *foreclosed* by the tariff from granting petitioner relief from a portion of the demurrage charges; rather, the Review Board concluded that the voluntary agreement is not inequitable and declined to order relief as a matter of discretion (Pet. App. A-10). The court below found that the agency's denial of relief was a reasonable exercise of agency discretion under the circumstances (*id.* at A-6).

Applying the standard of review articulated by this Court in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974), for judicial review of discretionary agency action, the court of appeals properly upheld the Commission's denial of relief from the penalty portion of the demurrage as "neither arbitrary nor capricious, nor unreasonable, nor an abuse of discretion" (Pet. App. A-7). Indeed, the court found "unassailable" (*id.* at A-5) the Commission's position that the penalty portion of the demurrage should not be forgiven here, in view of the average agreement in effect between petitioner and B & O.

Surely, it is neither arbitrary nor an abuse of discretion for the Commission, in determining whether a portion of the clearly applicable demurrage charges should be refunded in a particular case, to take into consideration an agreement between a railroad and a shipper that provides an alternative method for minimizing the shipper's overall demurrage charges—*i.e.*, by assigning values to the shipper's favor, through a system of credits, where cars are released early in the free time period.[4] Because an average agreement provides "a concession in favor of the shipper" (Pet. App. A-10) that is not available to other shippers that operate under the straight demurrage method, it is not unreasonable for the Commission to treat a shipper such as petitioner differently based on an average agreement providing for mitigation of demurrage in a particular way, and, therefore, to decline to order a refund of demurrage that may be available to shippers operating under the straight demurrage method.

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[4]Petitioner's additional contention (Pet. 10-14) that the court of appeals erroneously relied upon a rationale not in the Commission's decision is incorrect. The Commission refused to abate the demurrage charges because those charges were not unreasonable or inequitable, in view of the average agreement (Pet. App. A-10). The court of appeals affirmed the Commission's rationale (*id.* at A-4, A-7).

As the court of appeals observed, "[t]he ICC has consistently determined not to allow a shipper the advantages of both straight demurrage and average agreement demurrage, while excusing it from the corresponding disadvantage of either" (Pet. App. A-5). Yet that is what petitioner seeks here—to continue to benefit from the averaging of demurrage, in accordance with the terms of the agreement it has had with B & O over the last 30 years, and, beyond that, to obtain a refund of the penalty portion of the demurrage in this particular case. Especially given the consistent Commission practice identified by the court of appeals (Pet. App. A-5), the Commission acted reasonably in distinguishing among shippers, for purposes of demurrage refunds, on the basis of the contractual relationship between the shipper and the railroad.[5]

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[5]Petitions for review of other Commission orders involving the issue presented by this case are currently pending in three courts of appeals. See *Empire-Detroit Steel Division* v. *ICC*, No. 80-2790 (3d Cir., filed Dec. 17, 1980); *Cleveland Electric Illuminating Co.* v. *ICC*, Nos. 80-3727, 80-3792, and 80-3793 (6th Cir., filed Nov. 14, 1980); *Central Illinois Public Service Co.* v. *ICC*, No. 80-2006 (7th Cir., filed July 28, 1980). Should one of these courts of appeals reach a decision in conflict with the decision below, this Court may consider at that time whether further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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